

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION**

CODEGEAR LLC,

Plaintiff,

v.

DELPHIX CORP.

Defendant.

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Civil Action No. 1:19-cv-00563-RP

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**DEFENDANT DELPHIX CORP.'S OPPOSITION TO PLAINTIFF CODEGEAR LLC'S  
MOTION TO FILE A REQUEST FOR JUDICIAL NOTICE**

Defendant Delphix Corp. submits this response to Plaintiff CodeGear LLC's Opposed Motion to File a Request for Judicial Notice (Dkt. 20).

The briefing on Embarcadero Technologies, Inc.'s motion for judgment on the pleadings does not change the basis for transfer before this Court: this lawsuit and the first-filed California action "substantially overlap." Regardless of the outcome of Embarcadero's motion in the California action, these facts remain: CodeGear, LLC and its parent company Embarcadero Technologies, Inc. have sued Delphix Corp. based on the same claimed registered trademark rights in both Texas and California. CodeGear and Embarcadero now take the position that, even though Embarcadero has asserted a claim based on the registered trademark in California, the California court cannot assess the validity of the registered trademark. That is wrong, for reasons Delphix explains in its opposition to that motion. But in any event, Embarcadero and its wholly owned subsidiary, CodeGear, are still asserting the *same* federal trademark claims under 15 U.S.C § 1114 and 15 U.S.C § 1125, based on the *same* rights in the claimed DELPHI trademark registration, based on the *same* alleged use in commerce by Embarcadero, against the *same* defendant, Delphix, and seeking the *same* damages and injunctive relief. Accordingly, Fifth Circuit authority requires the transfer of this case to the court presiding over the earlier-filed California action.

Delphix Corp. opposes CodeGear's request for judicial notice because the briefing in the related California action is unnecessary to this Court's decision regarding whether the Fifth Circuit's "first-filed" rule requires transfer of this action to California. If, however, the Court is inclined to grant CodeGear's request for judicial notice, then to "fully inform[]" the Court "of the facts and arguments in [the California action]" as CodeGear purportedly intends (Dkt. 20 at 1), the Court should also accept judicial notice of Delphix's opposition brief to Embarcadero's

motion for judgment on the pleadings in the California action. Delphix's opposition brief in the California action is attached at Exhibit 1.

Respectfully submitted,

Dated: August 2, 2019

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By: /s/ Eric Ball

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**CERTIFICATE OF SERVICE**

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this filing via the Court's CM/ECF system per Local Rule CV-5(b)(1) on August 2, 2019.

/s/ Eric Ball

Eric J. Ball